

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TREVOR WISDOM	:	DETERMINATION
	:	DTA NO. 815553
for Revision of a Determination or for Refund of Motor	:	
Fuel Tax under Article 12-A of the Tax Law for the Period	:	
June 1, 1986 through July 31, 1986.	:	

Petitioner, Trevor Wisdom, 875 Cedar Swamp Road, Old Brookville, New York 11545, filed a petition for redetermination of a deficiency or for refund of motor fuel tax under Article 12-A of the Tax Law for the period June 1, 1986 through July 31, 1986.

Pursuant to 20 NYCRR 3000.9(a)(1)(i) and 3000.9(b), the Division of Taxation ("Division") by its representative, Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel) moved to dismiss the petition or, alternatively, moved for summary determination based upon documentary evidence. Based upon the affirmation dated March 25, 1997 of John E. Matthews, Esq., with attached exhibits in support of the motion, and the affidavit dated April 22, 1997 of Norman R. Berkowitz, Esq., in opposition to the motion, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was a responsible officer of Wizard Petroleum, Inc., and was therefore properly assessed a penalty equal in amount to the penalty and interest due from the corporation.

FINDINGS OF FACT

1. Wizard Petroleum, Inc. ("Wizard Petroleum") was a distributor of motor fuels, which filed untimely monthly motor fuel tax returns for June and July 1986. These late-filed returns reported 1,696,685 gallons and 4,631,782 gallons of motor fuel subject to tax for June 1986 and July 1986, respectively. After taking credit for certain specified sales, Wizard Petroleum

reported tax due of \$135,784.71 and \$368,183.99 on 1,653,652 gallons and 4,591,574 gallons of motor fuel for June 1986 and July 1986, respectively. The Division received these returns, according to an in-date stamp, on September 8, 1986. Photocopies of three checks of Wizard Petroleum each dated September 24, 1987, in the amounts of \$135,784.71, \$200,000.00, and \$168,183.99, show late payment of the taxes reported due approximately two weeks after the late filing of the tax returns. The sum of the two checks in the amounts of \$200,000.00 and \$168,183.00 equals the \$368,183.99 shown due on the return for July 1986. In addition, each check was signed by petitioner, Trevor Wisdom.

2. The Division of Taxation ("Division") issued a Notice of Determination of Tax Due under Motor Fuel Tax Law dated November 10, 1987 against Wizard Petroleum asserting penalty and interest due of \$117,270.65 and \$40,947.90, respectively, for a total amount due of \$158,218.55 for the following reason:

"Since additional tax liability was paid per late filing of the returns, this assessment represents penalty and interest due on said returns."

A corresponding Notice of Determination also dated November 10, 1987 was issued against petitioner, Trevor Wisdom, as officer of Wizard Petroleum.

An assessment history included in the administrative record on this motion shows that, as of February 24, 1997, although the penalty amount due of \$117,270.65 remains the same, interest due has increased from the original assessment of \$40,947.90 to \$91,298.74.

3. The its answer, the Division made the affirmative statement that petitioner was an officer of Wizard Petroleum under a duty to act for the corporation, and that therefore, pursuant to Tax Law § 289-b, he was a person liable for a penalty equal in amount to any tax, penalty and interest due from Wizard Petroleum. In support of this affirmative statement, the Division included in the administrative record on this motion, photocopies of 11 separately identified documents summarized as follows:

(1) An Application for Registration as Distributor of Gasoline and Similar Motor Fuels for Wizard Petroleum dated July 8, 1985 which reported that petitioner was (i) the president of

Wizard Petroleum, and (ii) owned one-third of its stock;

(2) A business check of Wizard Petroleum dated February 4, 1986 in the amount of \$126,829.17 in payment of motor fuel tax for November 1985 signed by petitioner;

(3) Two business checks of Wizard Petroleum each dated November 6, 1987 in the amounts of \$7,407.64 and \$228,690.90, respectively, and each signed by petitioner for Wizard Petroleum's sales tax prepayment on motor fuel for December 1985 and March 1986, respectively;

(4) An Application for Motor Fuel Tax and Sales and Use Tax Reregistration of Wizard Corporation¹ date stamped received by the Division's Miscellaneous Tax Bureau on June 16, 1987, which was signed by petitioner and shows Mr. Wisdom as 50% owner and vice-president of Wizard Corporation. It is observed that no individual is shown as president of Wizard Corporation with only two officers listed, petitioner as vice-president and Ashley Jarwood as secretary. Petitioner's duties were described as "operations";

(5) A "Secretary's Certificate Respecting Wizard Corp. dated as of July 23, 1990" of Ashley Jarwood indicating that she and petitioner each own 50% of the outstanding stock of Wizard Corporation and "to the best of my knowledge following reasonable inquiry, no other person has any beneficial interest in or voting or dispositive control with respect to any such securities";

(6) An affidavit by petitioner dated May 12, 1992 indicating that he is the president of Wizard Petroleum, Inc. and that an individual named Joseph A. Bernardo, "who was a minority stockholder of Wizard Petroleum, Inc. never had anything to do with the day-to-day operation of the business of Wizard Petroleum, Inc." Petitioner also swore that Mr. Bernardo "resigned and divested himself of his stock in Wizard Petroleum, Inc. on May 19, 1986";

(7) Two monthly motor fuel tax returns for May 1987 and June 1987 showing tax due of

¹This reregistration form references an entity by the name of Wizard Corporation with a Federal employer identification number of 112714701. This is the same identification number as shown for Wizard Petroleum on the Application for Registration as Distributor of Gasoline and Similar Motor Fuels dated July 8, 1985 as noted above.

\$487,046.40 on 6,088,080 gallons and \$399,822.90 on 4,995,553 gallons of motor fuel, respectively, which were signed by petitioner on behalf of Wizard Petroleum in his capacity as president of the corporation. Petitioner's signature is dated June 11, 1987 and July 16, 1987 on the May 1987 and June 1987 returns, respectively;

(8) A corporate power of attorney for Wizard Petroleum dated August 1, 1990 appointing attorney Norman R. Berkowitz to represent it concerning sales and use taxes for the period 1986-1988 which was executed by Trevor Wisdom in his capacity as president of Wizard Petroleum;

(9) A letter dated November 16, 1987 on the letterhead of Wizard Petroleum from petitioner to the Division's Director of the Processing and Revenue Management Division concerning tax payments made by Wizard Petroleum;

(10) A New York corporation franchise tax report of Wizard Corporation for the taxable period beginning June 1, 1986 and ending May 31, 1987 which was signed by Trevor Wisdom in his capacity as president of the corporation. It is observed that this tax return references a Federal employer identification number of 112714701 which is also Wizard Petroleum's identification number;

(11) A United States corporation income tax return of Wizard Corporation for 1987 signed by petitioner in his capacity as vice-president of the corporation. Petitioner's signature is dated February 8, 1989. Once again, it is observed that the Federal employer identification number shown for Wizard Corporation is the same as Wizard Petroleum's identification number.

4. Petitioner has not offered any evidentiary proof to support his attorney's unsubstantiated allegations that petitioner was not under a duty to act for Wizard Petroleum during the period at issue and that he merely held a corporate office. Not even an affidavit of petitioner, supportive of his attorney's allegations, was submitted for review.

5. By a letter dated April 30, 1997, the Division requested that, in reviewing the motion

at hand, consideration should be given to the recent decisions by the Tax Appeals Tribunal in Matter of Janus Petroleum (April 24, 1997) and Matter of Terminelle Corporation (April 24, 1997) wherein the Tribunal found that Mr. Wisdom was an officer and major owner of Wizard Petroleum. The period at issue here, the months of June and July 1986, were included in the period covered by the Tribunal's finding that Mr. Wisdom was an officer and major owner of Wizard Petroleum. The Tribunal cited an open assessment against Wizard Petroleum for the period June 1, 1986 to July 31, 1987 totalling \$14,155,848.46 consisting of tax due of \$4,204,879.96, penalty due of \$2,102,439.98 and interest due of \$7,848,528.52. It is further observed that the Tribunal in these two decisions held that Janus Petroleum's diesel motor fuel registration should be cancelled and Terminelle Corporation's terminal operator license should be cancelled because the two operating officers of these corporations, which included petitioner, were the operating officers of Wizard Corporation, "a corrupt enterprise" which engaged in fraudulent conduct.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 289-b(2), an officer of a corporation who is under a duty to act for such corporation, which is a motor fuel distributor, is personally liable for penalties and interest that have been imposed against the corporation under Tax Law § 289-b.

B. As noted in the findings of fact, petitioner in his capacity as a corporate officer untimely paid, with checks dated September 24, 1987, motor fuel tax that was due from Wizard Petroleum for the months at issue. The Division has sought to collect penalty and interest for such late payment from petitioner as an officer of Wizard Petroleum and has offered for review on its motion numerous documents to establish that petitioner was an officer of Wizard Petroleum responsible for the corporation's operations. In particular, it is observed that petitioner signed the checks in payment of the taxes at issue, as well as checks for tax liabilities of Wizard Petroleum for periods before and after the months at issue. It is also noted, as emphasized by the Division, that petitioner was found to be an officer of Wizard Petroleum and

responsible for the operations of the corporation during the period June 1, 1986 to July 31, 1987, which includes the two months at issue herein, in Matter of Janus Petroleum (supra) and Matter of Terminelle Corporation (supra).

C. In response to the Division's motion, petitioner has offered only his attorney's affidavit which has no probative value (see, DiSabato v. Soffes, 9 AD2d 297, 300-301, 193 NYS2d 184, 189-190, revd on other grounds, 11 AD2d 981, 207 NYS2d 991; Siegel, NY Prac § 281, at 410 [2d ed]). Petitioner did not even offer his own affidavit to show that there is a material and triable issue of fact. Consequently, the facts asserted by the Division, which have not been controverted by petitioner's offer of evidentiary facts or materials, are properly deemed admitted (see, Kuehne & Nagel, Inc. v. Baiden, 36 NY2d 539, 369 NYS2d 667). In sum, the Division's motion for summary determination is properly granted (cf., Matter of McNamara, Tax Appeals Tribunal, January 30, 1997).

D. The petition of Trevor Wisdom is denied, and the Notice of Determination dated November 10, 1987 against petitioner is sustained.

DATED: Troy, New York
July 10, 1997

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE